

December 21. 1770.

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Unto the RIGHT HONOURABLE

The LORDS OF COUNCIL AND SESSION,

T H F

## P E T I T I O N

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JOHN REYNOLDS Merchant in London,

*Humbly sheweth,*

**T**HAT, on 15th April 1769, William Young merchant in Aberdeen drew a bill on Messrs M'Culloch and Young in London for L. 100 Sterling, payable five days after sight, to William Mitchell merchant in Aberdeen, or his order.

William Mitchell, the creditor in this bill, transmitted the same to his brother and correspondent Alexander Mitchell merchant in London, by the post which left Aberdeen on said 15th April, having first indorsed it to him blank, by putting his own name on the back, which is the method of indorsation usually practised amongst merchants.

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It

It happened that Alexander Mitchell had stopped payment on the 12th of April. The petitioner, as one of his creditors, took out a commission of bankruptcy against him ; and, on the second of May following, which was as soon as the necessary forms of giving notice in the London Gazette, &c. could admit of it, the petitioner, together with John Varnham another of the creditors, was chosen assignee of Alexander Mitchell's estate and effects, under the commission of bankruptcy, and the petitioner was the acting assignee, on whom the trouble of management ~~devolved~~ *devolved*.

So soon as the commission of bankruptcy was issued, and before the forms requisite for the petitioner's being chosen assignee could be compleated, Alexander Mitchell lodged in the petitioner's hands, by virtue of the commission of bankruptcy, in presence of the King's messenger, and for behoof of his whole creditors, all his bills and securities of which he was then possessed ; and in like manner he put into the petitioner's hands, for behoof of his creditors, from day to day, such other bills as became his property, by coming indorsed to him from any of his correspondents in the course of his trade, and, amongst others, the L. 100 bill above mentioned, drawn by William Young upon M'Culloch and Young.

The petitioner, how soon he received this bill, not doubting that it would be duly honoured, considered it as part of the bankrupt's estate, and as such, placed it to the credit of that estate for behoof of the whole creditors for whom he acted. He then, as his duty required, presented it for acceptance to M'Culloch and Young ; but they refused to accept it ; and the reason of their refusal was, that William Young, after he had drawn the bill, wrote them a letter, desiring they might not accept the same, because William Mitchell the original creditor had failed, and because William Young the drawer had, as he pretended, got no value for the bill. This last averment was not true ; for William Young does now acknowledge that, when he drew this bill, he got from William Mitchell

Mitchell, the creditor therein, his acceptance for L. 101 Sterling, being the sum of the bill with one *per cent.* of exchange.

William Young's letter, however, to M'Culloch and Young, had the effect to make them refuse acceptance; and, upon their refusal, the petitioner took a protest in common form, both against them and against Young the drawer. This protest, together with the bill, the petitioner immediately sent to Aberdeen to be the foundation of diligence against the drawer, in case diligence should be necessary. The petitioner, at the same time, put an indorsation on the back of the bill, in favours of Mr George Gordon his correspondent at Aberdeen, for the purpose of empowering him to receive the money, in case Young the drawer should be disposed to pay his bill, without being legally compelled.

But this being refused, it became necessary to proceed in diligence; with that view the bill and protest were registrate in the sheriff court-books of Aberdeen, and the sheriff's precept was issued for charging William Young, who thereupon presented a bill of suspension; upon advising which, with answers and replies, the Lord Strichen Ordinary refused the bill; but, upon a petition and answers, your Lordships were pleased to remit to the Lord Ordinary to pass the bill, in order that you might have the matter more fully before you.

The suspension being expedite, came to be discussed before the Lord Gardenston Ordinary. His Lordship, after hearing parties, appointed memorials to be given in; and, upon advising very full memorials, his Lordship pronounced this judgment. • The Lord Ordinary having considered the memorials 26 July  
 ' for both parties, finds the letters orderly proceeded, and de- 1770.  
 ' cerns.' But, upon advising a representation and answers,  
 his Lordship was pleased to pronounce this interlocutor: • The Dec. 11.  
 ' Lord Ordinary having considered therepresentation and an- 1770.  
 ' swers, and reviewed the particular circumstances of this case  
 ' alters,

‘ alters the former interlocutor, and suspends the letters *simpliciter*.’

This last interlocutor the petitioner must submit to the review of your Lordships, and is humbly persuaded that your Lordships will think the same ought to be altered, and that the Lord Ordinary’s former judgment was better founded.

The circumstance which seemed chiefly to weigh with your Lordships as a reason for passing the bill of suspension, was, that the petitioner, not having at that time given his agent sufficient information of the facts, his counsel could not set forth with precision under what character, and by what authority the petitioner acted in this matter; but these particulars are now cleared up by the affidavits, hereto subjoined, of the petitioner, and of Alexander Mitchell the bankrupt.

The defender found great fault with the production of these affidavits, which could not, he said, afford any evidence, because not taken by the authority of this court.

But, although it may be true, that these writings cannot be held as legal evidence in this cause, yet the defender had no reason to take exception at the production of them; he had repeatedly called upon the petitioner, peremptorily to say, under what character, by what authority, and in what way and manner he had received this bill. The petitioner has endeavoured to satisfy him on all these heads, by giving him a full and circumstantial account of every particular; and that account is not the worse, nor the less likely to be true, that the petitioner has given it upon oath. If the defender does not incline to hold this oath as evidence, let him take it as the allegation of the petitioner; and if, after inquiry, he does not chuse to rest upon it, but insists upon bringing it to proof, the petitioner shall have no objection thereto.

Supposing, however, the facts to be as the petitioner has stated them, the question turns upon a point of very great consequence. It has hitherto been understood, that nothing was better established in our law, and it is certain nothing can be  
of



of more importance in a commercial country than the free, safe, and easy transmission of bills, which are in use to pass from hand to hand like bank-notes, or bags of money, neither clogged by the debts, nor affectable by the deeds of the different persons through whose hands they pass; by this means, a multiplicity of transactions in bills is daily and hourly carried on with expedition and confidence, which would otherwise become dangerous and inextricable.

The defender's bill, drawn payable to William Mitchell, and by him transmitted with a blank indorsement to Alexander Mitchell, became thereby the property of Alexander, in the same manner as if the indorsement had been filled up in his name. This is a thing so established in practice as to admit of no doubt; bills pass daily, blank indorsed, through twenty different hands, and are always understood to belong to the holder, just as much as if the indorsement stood in his name. And this practice is authorised by statute; for, in the act 1696, cap. 25. which prohibits blank writings, an express exception is made of the indorsement of bills of exchange; so that the objection made by the defender, against the validity of the transmission of this bill, because it was sent to Alexander Mitchell with a blank indorsement, upon which the defender founded a good deal of argument, will not have any weight with your Lordships.

The bill then having become the property of Alexander Mitchell, by being transmitted to him in the course of trade, blank indorsed, was by him transferred, as already mentioned, to the petitioner for behoof of his whole creditors; and the petitioner having stated the same to the credit of the bankrupt's estate, was bound, in discharge of the duty of his trust, to follow out in the manner he has done the proper steps for making the same effectual, by presenting it for acceptance, protesting it when acceptance was refused, and now suing for recourse against the defender, the drawer of the bill.

B

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The defender seemed to lay the chief stress of his cause upon an alledged fraud in William Mitchell, in taking this bill at a time when he knew himself on the eve of bankruptcy; and, from the terms of the Lord Ordinary's last interlocutor, it would appear, that this allegation of fraud has had some weight with his Lordship in pronouncing that judgement.

How far William Mitchell was guilty of any fraud, or had any view to bankruptcy, at the time when he got this bill, is a thing of which your Lordships see it is impossible that the petitioner can have any knowledge; and, if any stress was to be laid on the supposition of that fact, it is, with submission, thought, that the truth thereof ought to have been some how instructed, and not taken for granted, upon the bare allegation of the defender. The petitioner, as he has already said, cannot be supposed to know any thing of the matter; and, in fact, he knows no more of it than what he sees in the story told by the defender, to which he is not bound to give credit.

The defender says, that William Mitchell took this bill, knowing that he was immediately to become bankrupt, and therefore was guilty of a fraud.

It is indeed true, that William Mitchell did become bankrupt within two days after the date of this bill; but it does by no means follow, that he was guilty of any fraud in this transaction with the defender. His credit was perfectly entire at the date of that transaction, as is sufficiently proved by the defender's so readily granting him this bill upon his acceptance for the sum; and it is an undoubted fact, that William Mitchell could that day have got the same, or even a much larger sum, upon his simple acceptance, from twenty merchants in Aberdeen besides the defender. And as, by the defender's own account of the matter, William Mitchell's bankruptcy was occasioned by the failure of his correspondent Alexander Mitchell at London, which happened only on the 12th of April, it was impossible that failure could be known to William Mitchell at Aberdeen on the 15th, when the bill in question was granted.

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There is not, therefore, the least ground to presume, that William Mitchell took this bill from the defender with an intention to defraud him of the money. The circumstances of the case seem indeed absolutely to exclude such a supposition; for, can any reasonable man believe, that William Mitchell, foreseeing the bankruptcy which was immediately to ensue, would gratuitously, and to serve no earthly purpose to himself, have defrauded the defender of this money, merely in order to send the same to London, to be divided amongst the creditors of Alexander Mitchell.

The petitioner, though intirely ignorant of the fact with respect to the alledged fraud of William Mitchell, cannot help taking notice of these apparent inconsistencies in the defender's account of the circumstances from which that fraud is inferred, which are so far from tending to that conclusion, that they do, in the petitioner's apprehension, render it absolutely incredible.

But, be that as it may, the petitioner is advised that it cannot possibly enter into consideration in the present question; and that he, having got right to this bill for a most onerous cause, cannot be affected by any exception which might have been competent against the original creditor, not even the exception of fraud.

The most gross and glaring act of fraud that can be committed by the creditor in a bill, is to indorse the same after he has received the payment; yet, even in that case, such fraud would not affect the onerous indorsee, but the granter of the bill would be obliged to pay to him a second time, notwithstanding his having formerly made payment to the original creditor.

In like manner, the exception that a bill was elicited, when the acceptor was intoxicated with liquor, and without any onerous cause, was found not relevant against an onerous indorsee, 24th February 1736, Wilson and Frazer against Nisbet of Craighentinnie. Upon the same ground it was found, that a bill having been granted for money won at play,  
afforded

afforded no sufficient defence against payment thereof to an onerous indorsee; 26th January 1740, Neilson against Bruce of Newgrange.

Were these established principles to be altered, the security of all transactions in bills would be unhinged, which would lead to inextricable confusion; and it is easy to see what a fatal blow it would give to the credit and commercial dealings of this country, if it should, by a judgment of your Lordships, be declared the law of Scotland, that a bill of exchange drawn in Scotland, transferred by indorsation in the course of trade to a merchant in London, and, upon the failure of that merchant, again transferred to his onerous creditors towards their payment, is to be held as null, and can produce no action on account of a supposed fraud of the original drawer; because, soon after the date of the bill, he became bankrupt, although he was in very good credit at the time of drawing it: The consequence would be, that no London merchant could safely accept of an indorsation, however onerous, to a Scotch bill, without sending to Aberdeen, Banff, Inverness, or whatever other place in Scotland the bill was drawn from, to learn the precise circumstances of the drawer at the date of the bill; and not only in what credit he was at that time, but how long he continued in good credit thereafter; and the same inquiry, if necessary as to the original drawer, would be equally so with respect to all the intermediate indorsers.

The defender, in support of his argument, quoted the case of a bill not long ago reduced by your Lordships, in a question between John Thain, and Lindsay, and Boog; Thain's daughter, with the concurrence of Lindsay and Boog, two of her creditors, had formed a scheme to defraud her father by procuring, by false allegations, his acceptance to a bill payable to Lindsay and Boog. It was impossible your Lordships could hesitate to reduce that bill, and to prevent the committers of so gross a fraud from reaping the benefit thereof. But that case, it is plain, has not the most remote affinity to the present.

The



The defender moved some slight objection to the formality of the diligence proceeding upon this bill. What he chiefly insisted upon, was, that the charge was given in the petitioner's name, notwithstanding the indorsation to George Gordon. But there is evidently nothing in this objection. The bill was protested by the petitioner; the bill, together with the protest, in his name, were registrated in the sheriff court-books; it was therefore in his name only that the sheriff's precept could be issued, and the charge given; so that the indorsation to George Gordon, made after the bill was protested by the petitioner, could have no effect; nor does George Gordon, (to whom only it could at any rate be competent) make any claim upon that indorsation.

To conclude, the petitioner, and the other creditors for whom he is acting, suffer great loss by the bankruptcy of Alexander Mitchell; the defender, by paying this bill, may, perhaps, likewise be a loser by William Mitchell's bankruptcy; but this is no argument why he should not be liable for payment of the bill which he drew, nor any reason why the rules of law, and the established and most important commercial principles in regard to the transaction of bills, should be got over in his favours, to the prejudice of Alexander Mitchell's creditors, who are *in pari casu* with him, and are equally *certaines de damno evitando*.

*May it therefore please your Lordships, to alter the Lord Ordinary's last interlocutor, and to adhere to his Lordship's interlocutor of 26th July, 1770; and to find the letters orderly proceeded; and the defender liable in expences.*

According to Justice.

W. NAIRNE.

C

COPY

## COPY of Affidavits mentioned in the foregoing Petition.

**A**LEXANDER MITCHELL of Basing-lane, London, merchant, dealer, and chapman, the person against whom a commission of bankruptcy, under the great seal of Great Britain, hath been lately awarded and issued; and John Reynolds, of Thames-street London, merchant, one of the assignees of the estate and effects of the said Alexander Mitchell, severally make oath, and say; and first this deponent Alexander Mitchell for himself, saith, That, on the twenty first day of April last, he received in a letter by the post, wrote by William Mitchell the younger of Aberdeen, to him this deponent, a bill of exchange, dated the fifteenth day of this same April, drawn by William Young, on Messieurs M'Culloch and Young of London, for payment, five days after sight, to the said William Mitchell, of the sum of one hundred pounds sterling, and which said bill was by the said William Mitchell indorsed to this deponent; and this deponent saith, That, as soon as he, this deponent, received the said bill, he gave the same to the said John Reynolds, as part of his this deponent's estate and effects. And this deponent John Reynolds for himself saith, That he received the said bill of exchange from the other deponent Alexander Mitchell, as part of his the said Alexander Mitchell's estate and effects; and that he looked upon the said bill as a good bill for the said sum of one hundred pounds; and this deponent saith, he immediately placed the same to the credit of the said bankrupt's estate; and this deponent, John Reynold's further saith, he sent the said bill of exchange to the said Messieurs M'Culloch and Young for acceptance, which was

was refused by them, as this deponent has been informed and verily believes. (signed)

ALFX. MITCHELL.  
JOHN REYNOLDS.

Sworn at Guildhall, London, the 26th day of October 1769, before me *Robert Alfop*, alderman of the city of London.

ALEXANDER MITCHELL, of Basing lane, London, merchant, against whom a commission of bankruptcy hath been lately awarded and issued, maketh oath, That John Reynolds of Thames street, London, merchant, and John Varnham of Five Foot lane, Southwark, in the county of Surry, fell-monger, were, on the second day of May last, at Guildhall, London, pursuant to notice in the London Gazette for that purpose given, chosen assignees of this deponent's estate and effects, and an assignment thereof was executed to them accordingly by the major part of the commissioners named in the said commission. And this deponent faith, That the said John Reynolds is the acting assignee of this deponent's estate and effects. (signed) ALEX. MITCHELL.

Sworn in before me, this 20th  
Feb. 1770, *Will. Beckford*, Mayor.